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No. 03-377

In the Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE AMERICAN BANKERS ASSOCIATION, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, AND THE CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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28 pp

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Under Rule 37.2 of the Rules of this Court, the American Bankers Association, the American Financial Services Association, and the Consumer Bankers Association move for leave to file the accompanying brief in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for the respondent has been asked for consent and has not consented.

The issue presented by the petition – whether Congress intended to eliminate the cap that had existed since 1968 on statutory penalties for non-mortgage, non-lease violations of the Truth in Lending Act (TILA) – is of profound importance to the consumer lending industry and to individual consumer borrowers nationwide. Members of *amici curiae* include thousands of lenders that, under the Fourth Circuit's new interpretation, potentially are subject to civil penalties *running tens of thousands of dollars in* ***each case*** for technical violations of TILA and its interpreting regulations, even when those violations are inadvertent and cause no harm to borrowers. *Amici curiae* are well situated to assist the Court in understanding the enormous importance of the TILA issue presented.

Amicus curiae American Bankers Association (ABA) is the largest national trade association of banks in the United States. The ABA represents approximately 90 percent of the domestic assets of United States banks, with members located in all fifty States and in the District of Columbia. ABA members include banks of all types and sizes – including money-center banks, regional banks, and community banks. The ABA frequently appears in litigation as *amicus curiae* in cases raising issues of widespread importance to banks or consumers of banking services.

Amicus curiae American Financial Services Association (AFSA) is the national trade association for finance companies and other consumer and commercial lenders that raise funds in the capital markets. Founded in 1916, AFSA has approximately 360 member companies operating more than 10,000 offices throughout the United States, all engaged in the extension of consumer credit. On behalf of its members, AFSA monitors legislative, regulatory, and judicial actions affecting the market-funded finance industry, and participates as *amicus curiae* in

litigation to ensure that the courts are apprised of relevant and accurate industry information.

Amicus curiae Consumer Bankers Association (CBA) was founded in 1919 and has as members most of the Nation's largest bank holding companies, as well as regional and super community banks, that collectively hold two-thirds of the banking industry's total assets (in excess of $2.9 trillion). Its member institutions are the leaders in consumer financial services, including auto finance, home-equity lending, credit cards, education loans, small business services, community development, investments, deposits, and delivery. Through its Government Relations Department, CBA advocates on behalf of its membership on issues before the regulatory agencies, the Legislative Branch, and the courts, including issues relating to TILA.

Amici have a strong interest in this Court's granting certiorari in view of the potentially catastrophic effect the Fourth Circuit's rule will have on the consumer credit industry. Members of *amici* are subject to TILA and its implementing regulations when engaged in their core business of consumer lending. The enormous possible harm to the industry from large-scale civil awards for technical violations of TILA in the absence of a cap on penalties was not adequately considered by the court below.

The Motion for Leave to File the accompanying Brief of the American Bankers Association, the American Financial Service Association, and the Consumer Bankers Association as *Amici Curiae* should be granted.

Respectfully submitted.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT 1

SUMMARY OF ARGUMENT 8

ARGUMENT 8

I. If Left Intact, the Panel's Holding Threatens to Have an Enormous and Harmful Impact on the Consumer Lending Industry 9

II. A Principled Reading of TILA and its Legislative History Compels the Conclusion That Congress Intended the $1000 Liability Limitation to Encompass Both Sub-subparagraphs (i) and (ii) of Subparagraph (A) of 15 U.S.C. § 1640(a)(2) ... 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

BMW of North Am., Inc. v. *Gore*, 517 U.S. 559 (1996) ... 19

Clay v. *Johnson*, 77 F. Supp. 2d 879 (N.D. Ill. 1999) 19

Golding v. *Floyd*, 539 S.E.2d 735 (Va. 2001) 5

Independent Ins. Agents of Am., Inc. v. *Clarke*, 955 F.2d 731 (D.C. Cir. 1992), rev'd *sub nom United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993) 8

Mars v. *Spartanburg Chrysler Plymouth*, 713 F.2d 65 (4th Cir. 1983) 6

McGowan v. *King*, 569 F.2d 845 (5th Cir. 1978) 14

NLRB v. *Federbush Co.*, 121 F.2d 954 (2d Cir. 1941) ... 18

Rucker v. *Sheehy Alexandria, Inc.*, No. 02-466-A (E.D. Va. Mar. 18, 2003) 15

Sanders v. *Auto Assocs., Inc.*, 450 F. Supp. 900 (D.S.C. 1978) 16

Strange v. *Monogram Credit Card Bank*, 129 F.3d 943 (7th Cir. 1997) 4, 18, 19

United Savings Ass'n of Texas v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988) 7

United States Nat'l Bank of Oregon v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993) 8, 18

Wilson v. *Allied Loans, Inc.*, 448 F. Supp. 1020 (D.S.C. 1978) 14

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes and Regulations:

12 C.F.R. Part 226 ..... *passim*

15 U.S.C. §§ 1601-1666 ..... *passim*

Miscellaneous:

H.R. REP. NO. 90-1040, 90th Cong., 1st Sess., (1967), reprinted in 1968 U.S.C.C.A.N. 1962 .... 3, 15

S. REP. NO. 103-169, 103d Cong., 1st Sess., (1993), reprinted in 1994 U.S.C.C.A.N. 1881 3

S. REP. NO. 96-73, 96th Cong., 1st Sess. (1979), reprinted in 1980 U.S.C.C.A.N. 280 13

Hearings on S. 650 before the Subcomm. on Financial Institutions and Regulatory Relief of the Senate Comm. on Banking, Housing and Urban Affairs, 104th Cong., 1st Sess. (1995) (statement of FDIC Chairman Ricki Helfer) 12

John W. Edmonds, III & George W. Taylor, Jr. *Truth and Consequences*, 35 WASH & LEE L. REV. 367 (1978) . 14

Elwin Griffin, *Searching for Truth in Lending: Identifying Some Problems in the Truth in Lending Act and Regulation Z*, 52 BAYLOR L. REV. 265 (2000) 18

Elwin Griffin, *The Truth and Nothing But the Truth: Confronting the Challenge in the Truth in Lending Act and Regulation Z*, 40 HOUS. L. REV. 345 (2003) 18

RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING (Robert A. Cook et al., eds., 2000). ..... *passim*

ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Consumers Still Carrying Load in Economic Recovery, USA Today, August 13, 2003 (Online Edition), http://www.usatoday.com/money/economy 9

http://www.alexandriacitywebsite.com/Blankingship.htm. 2, 13

http://www.bankrate.com 10

http://www.bayarea.com/mld/bayarea/business/4546860.htm 12

http://www.consumerfed.org/expndcrdit.pdf 12

http://www.federalreserve.gov/releases/g19/Current 9, 10, 11, 12

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The interest of the *amici curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

A. The Underlying Facts

This case arises out of an exceedingly common commercial transaction. After respondent Bradley Nigh went to a car lot owned and operated by petitioner Koons Buick Pontiac GMC, Inc., to purchase a used Chevrolet Blazer, he entered into a transaction substantially similar to transactions that take place 45 million times each year throughout the United States. Pet. 15. Like the vast majority of buyers of new and used automobiles, Nigh sought to finance his purchase. He entered into an arrangement under which, in exchange for his making a down payment, trading in his old car, and agreeing to proceed with a loan agreement on certain prescribed terms, he was able to take the Blazer home immediately – even though no lender had yet agreed to accept the arrangement reached by Nigh and Koons Buick. Pet. App. 2a. This type of "spot sale" is a common transaction in the consumer lending industry; it enables purchases and sales to proceed even at times when lending decisions cannot be made. Like all sellers of commercial goods engaged in spot sales, petitioner Koons Buick took a risk that it could secure financing for Nigh at the quoted rate.

Because of errors in the paperwork and the difficulty of finding a lender, petitioner and respondent signed two more agreements before Nigh ever entered into a contract with a

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

lender – during which time Koons Buick was deprived of the use of the Blazer, and was receiving no payment for it. By the time Nigh did become contractually obligated to pay on a loan, he apparently had decided he did not want the car – for he made no payments, but drove the Blazer for several weeks and then returned it. Pet. App. 3a-4a. On the basis of these events, Nigh sued petitioner in federal court under the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1666. Pet. App. 4a.

This is not an unusual fact pattern leading to a TILA suit: customers with buyer's remorse often become TILA plaintiffs after they or their counsel discover a glitch in the transaction, or a technical violation of one of TILA's many complex requirements, thereby providing grounds to back out of the bargain – and take home money as well in the form of an award under TILA. Indeed, if *respondent's* own counsel is to be believed, "[n]early every car transaction contains one or more violations of a statute or regulation." http://www.alexandriacitywebsite.com/Blankingship.htm (visited October 8, 2003).

B. The Truth In Lending Act

Distilled to its essence, TILA is a statute that requires lenders to disclose information related to consumer borrowing, with the intent of giving consumers a basis for evaluating the cost of credit. 12 C.F.R. § 226.1(b); RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 1.01, at 3 (Robert A. Cook et al., eds. 2000). Lenders are required to make highly specific disclosures in a form that complies with complex regulations – set forth in TILA (see 15 U.S.C. §§ 1637, 1637a, 1638) and in the interpreting Regulation Z promulgated by the Federal Reserve Board (see 12 C.F.R. Part 226).[2]

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[2] Regulation Z "applies to each individual or business that offers or extends credit when four conditions are met: (i) The credit is offered or extended to consumers; (ii) the offering or extension of credit is done regularly; (iii) the credit is subject to a finance charge or is payable by a written agreement in more than 4 installments; and (iv) the credit is primarily for personal, family, or household purposes." 12 C.F.R. § 226.1(c).

Congress established criminal, administrative, and private civil enforcement schemes for TILA. ROHNER & MILLER, *supra*, ¶ 13.01, at 885. Despite congressional intent that administrative enforcement be the primary mechanism to ensure compliance with TILA disclosure requirements (see H.R. REP. NO. 90-1040, 90th Cong., 1st Sess. (1967), reprinted in 1968 U.S.C.C.A.N. 1962, 1976), private civil suits have overwhelmed other enforcement mechanisms. ROHNER & MILLER, *supra*, ¶ 13.01, at 886. Before 1995, liability for a TILA violation was set at (15 U.S.C. § 1640(a)):

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000[.]

Despite the placement of the $1000 cap on liability in sub-subparagraph (ii), federal courts uniformly and correctly understood that the $1000 liability limitation, which was included in the original 1968 enactment (1968 U.S.C.C.A.N. at 1976 (discussing the $1000 cap on civil TILA liability)), applied to the entire subparagraph (A), *i.e.*, both to sub-subparagraph (ii) *and* to sub-subparagraph (i). See Pet. 19-20 (citing authority); Pet. App. 9a-10a.

Expressing special concern about the dangers associated with non-disclosure of information concerning closed-end loan transactions secured by dwellings or real property, Congress in 1995 amended the civil enforcement section to provide *higher* caps on statutory damages in the high-cost home mortgage context. See S. REP. NO. 103-169, 103d Cong., 1st Sess. (1993), reprinted in 1994 U.S.C.C.A.N. 1881, 1886, 1905 ("This

subtitle amends [TILA] to provide new consumer protections for non-acquisition mortgages with high fees or interest rates. * * * [T]he bill provides increased civil liability for failure to comply with the requirements for High Cost Mortgages[.]"). The amendments added a third sub-subparagraph to Section 1640(a)(2)(A), and moved an "or." Currently the liability provision reads:

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000[.]

As amended, the statute retained the same arguable ambiguity as to whether the $1000 liability cap covered sub-subparagraph (i), as well as sub-subparagraph (ii); but, in keeping with its concern about loans secured by mortgages on property, Congress made it very clear in sub-subparagraph (iii) that an *increased* cap applied to those loans.

One federal court of appeals addressed the $1000 cap over the first eight years following the amendments. The Seventh Circuit held that the meaning of sub-subparagraphs (i) and (ii) remained untouched by the addition of sub-subparagraph (iii). See *Strange* v. *Monogram Credit Card Bank*, 129 F.3d 943, 947 (7th Cir. 1997). The correctness of the Seventh Circuit's interpretation – or the diametrically opposed interpretation reached by a divided panel of the court below – is what is now before this Court.

C. The Proceedings Below

Nigh sued Koons Buick under TILA and other state and federal statutes. Koons Buick counterclaimed for breach of contract, based on Nigh's complete failure to make any payments beyond the initial $4000 down payment. Judge Lee awarded summary judgment to Koons Buick on its breach-of-contract counterclaims against Nigh and on several of Nigh's claims. The suit was tried to a jury on Nigh's TILA claim and a Virginia Consumer Protection Act (VCPA) claim. Pet. App. 2a. Over objections by counsel for Koons Buick, Judge Lee instructed the jury that, if it found that Koons Buick violated TILA, it was required to award Nigh twice the finance charge (without regard to the $1000 cap). Pet. 9. The jury awarded Nigh $24,192.80 on the TILA claim and $4000 on the VCPA claim. Judge Lee then awarded Nigh attorneys' fees and court costs totaling $26,129.10. Pet. App. 53a. Koons Buick's total liability on Nigh's claims came to more than $54,000 (more than $50,000 under TILA alone) – for a canceled used-car transaction in which only $4000 had ever changed hands.

On appeal, a Fourth Circuit panel split 2-1 over whether the $1000 statutory cap on liability applied after 1995 to *loans* (except that narrow class of transactions subject to the higher $2000 cap), or only to *leases*.[3] Pet. App. 10a-13a; *id.* at 17a.

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[3] The panel was forced first to indulge the fiction that the transaction had been "consummated" before the parties had in fact reached a contract, because the TILA violations occurred in the *second* agreement – not the third, which ultimately was the basis for Nigh's contractual obligation to the lender. As the panel observed, "Regulation Z defines consummation as the 'time that a *consumer* becomes contractually obligated on a credit transaction.'" Pet. App. 6a (quoting 12 C.F.R. § 226.2) (emphasis in original). The court then held that, because Nigh had signed the second loan agreement, he had committed himself to a purchase of credit, although the contract was not complete. Of course, as a matter of contract law, that is not so. See *Golding v. Floyd*, 539 S.E.2d 735, 738 (Va. 2001) ("The execution of a formal agreement * * * was a condition precedent to the existence of a binding contract."). And, if the panel did

Looking solely at the confusing language of Section 1640(a)(2)(A), the panel majority noted that the $1000 cap on "liability under this subparagraph" in the pre-amended version of the section had been understood to apply to both sub-subparagraphs – with the word "subparagraph" meaning all of (A). Pet. App. 10a (citing *Mars* v. *Spartanburg Chrysler Plymouth*, 713 F.2d 65 (4th Cir. 1983)). But the panel read the post-amendment version differently.

The $2000 limitation that Congress placed on sub-subparagraph (iii) meant, in the panels' view, that the $1000 cap on liability that follows sub-subparagraphs (i) and (ii) no longer could be read to apply to *all* of (A) – even though (A) was no more and no less a "subparagraph" than it had always been. According to the panel, Congress's addition of sub-subparagraph (iii) also changed the meaning of sub-subparagraphs (i) and (ii). Pet. App. 11a. The panel concluded that the $1000 cap on liability that had applied to consumer loans in sub-subparagraph (i) since TILA's 1968 enactment now applies only to leases in sub-subparagraph (ii); that the loan transactions that had warranted particular congressional concern, in sub-subparagraph (iii), have a $2000 liability cap; and that for the first time in TILA's 35 years on the books there is *no* cap on TILA liability for errors in consumer loan transactions under sub-subparagraph (i). See Pet. App. 12a-13a. "It could well be," the panel majority conceded, "that Congress

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read Regulation Z as imposing TILA liability for the failure to make disclosures about a transaction that was never consummated, that plainly would be contrary to TILA – which allows liability to be imposed only if credit actually is extended. As one court has said: "In the *Nigh* opinion, the Fourth Circuit * * * neither discusses the official interpretation of 'consummation' under Regulation Z nor Virginia contract law. * * * This Court will defer to the Federal Reserve Board and its interpretation of consummation." *Bragg* v. *Bill Heard Chevrolet, Inc.*, 245 F. Supp. 2d 1235, 1238 (M.D. Fla. 2003) (citing 15 U.S.C. § 1638(b)(1); 12 C.F.R. §§ 226.17(b) & 226.2(a)(13); and 12 C.F.R. Part 226, Supp. 1 (official staff interpretations)). See also Pet. 17 n.13.

did not intend to alter the statutory cap applicable under [sub-] subparagraph (A)(i) [which the panel mistakenly called a "subparagraph"] when it amended the statute in 1995." *Id.* at 13a. Apparently unwilling to undertake the "holistic" inquiry that this Court's cases mandate (*United Savings Ass'n of Texas* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (Scalia, J.)), the panel majority disclaimed any judicial authority to search for congressional intent by looking beyond what it took to be the interpretation "compelled" by the statutory language. Pet. App. 13a.

Judge Gregory dissented. To him, the facts that the $1000 cap had *always* applied to both sub-subparagraphs (i) and (ii), and Congress did not amend those sub-subparagraphs, compelled the conclusion that the $1000 cap *still* applies to sub-subparagraphs (i) and (ii). Pet. App. 19a. Judge Gregory also believed that the majority's interpretation changed the meaning of the word "subparagraph." *Id.* at 20a-21a. Finally, Judge Gregory pointed to inconsistencies that the panel's new interpretation created in the statute. Because the "under this subparagraph" language was *not* included in the newly appended sub-subparagraph (iii), the new sub-subparagraph was structured differently than the pre-existing ones. Also, the phrase "under this subparagraph" was included in Section 1640(a)(2)(B) – a subparagraph providing limits on class action relief – and clearly referred to all of subparagraph (B). To limit "subparagraph" to sub-subparagraph (ii) in the first instance, but interpret it to mean all of subparagraph (B) in the second, created an internal inconsistency in the statute. *Id.* at 21a. The internally consistent construction, Judge Gregory said, is understanding the $1000 cap as applying to all of subparagraph (A), with sub-subparagraph (iii) carving out a specific exception for a class of loans generating particular congressional concern. That interpretation does no violence to the longstanding statutory scheme. *Id.* at 21a-22a.

SUMMARY OF ARGUMENT

The court below failed even to consider, much less to apprehend, the gravity of its holding that TILA liability for a broad range of consumer loan transactions is no longer capped by the $1000 statutory maximum that Congress imposed in 1968 and has never disturbed. The potential for harm – to consumer lenders, including members of *amici*; to manufacturers dependent on consumer purchasing; to consumers themselves; and to the national economy, which is driven by consumer spending – is difficult to overstate. And the Fourth Circuit's new holding is implicated not simply in the rare circumstances where malfeasant lenders abuse relationships with their customers. It is implicated by a significant percentage of large consumer purchases that take place tens of thousands of times daily in the United States. The danger of this harm can be avoided only if the panel decision is reversed by this Court.

The strict-constructionist theories of statutory interpretation adopted by the majority below depart irretrievably from this Court's precedents. The Fourth Circuit did great violence to the clear meaning and intent of the civil liability provisions of TILA. The Fourth Circuit's holding, which creates a direct split with the Seventh Circuit, cannot be reconciled with the language of the civil liability section taken as a whole; with prior interpretations of unchanged language in the section; or with Congress's clear absence of intent to make any change to a well-understood statutory scheme. And applying the panel's interpretation in everyday uses of the civil liability section produces absurd results.

ARGUMENT

In a manner eerily reminiscent of *Independent Ins. Agents of Am., Inc.* v. *Clarke*, 955 F.2d 731 (D.C. Cir. 1992), rev'd *sub nom. United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993), the panel's opinion stands as a monument to the dangers of slavish adherence to a

particular mode of statutory interpretation that is a caricature of – rather than a faithful following of – this Court's precedents. The panel opinion has produced an untenable result for the entire consumer lending industry. The panel's holding manifests an indifference to Congress's will – which is amply demonstrated in this case by the statutory text and the legislative history – that should not be countenanced. And the harms of increased litigation; increased cost of credit; greater difficulties for would-be borrowers in obtaining credit; and perverse incentives for borrowers-cum-plaintiffs were simply left out of the panel's analysis. For all of these reasons, the Court should grant certiorari and reverse the decision below.

I. If Left Intact, the Panel's Holding Threatens to Have an Enormous and Harmful Impact on the Consumer Lending Industry

A. The panel did not consider the magnitude of the industry that is, under its new rule, subject to uncapped, near-strict liability for TILA violations. As of August 2003, the total outstanding consumer credit in the United States amounted to $1.95 trillion – a total that has been increasing steadily in recent years, from $1.4 trillion in 1998. See http://www.federalreserve.gov/releases/g19/Current (visited October 8, 2003). With increased consumer spending driving hopes for a national economic recovery, a vital consumer credit industry is central to short-term economic growth. See, *e.g.*, *Consumers Still Carrying Load in Economic Recovery*, USA TODAY, August 13, 2003 (Online Edition), http://www.usatoday.com/money/economy. The potential economic harm from the drying up of consumer credit – because it becomes prohibitively expensive or otherwise unavailable – should not be allowed.

Of course, of the trillions of dollars in total consumer credit, the transactions implicated by the panel's new reading of Section 1640(a)(2)(A) are those in which the finance charge totals more than $500 (so that TILA damages of double the finance charge will exceed the $1000 cap that Congress imposed). The average new car loan by commercial banks, as

of August 2003, was financed at 6.77 percent over 48 months; and the average amount financed was $25,407. The total cost of credit on such a loan is about $3665 – thus, exposure under TILA is $7330, or more than seven times Congress's statutory maximum liability. For new auto loan transactions involving finance companies, the average finance rate is 3.56 percent; the total cost of credit is approximately $1890; and TILA liability in the absence of the statutory cap is $3780 – nearly four times Congress's intended statutory liability. See http://www.federalreserve.gov/releases/g19/Current (average loan amounts and annual percentage rates); http://www.bankrate.com (visited October 8, 2003) (calculates finance charges). It is not the extreme case, but the *normal* new auto loan transaction, in which a lawsuit over a technical TILA violation will result in penalties far in excess of the amount that Congress intended.

There are 45 million new and used automobile sales yearly (Pet. 15), of which 17 million are new automobile sales. See Brief of VADA, MNCTDA, and WANADA as *Amici Curiae* 3-4 & n.5 (VADA Brief). A substantial percentage of these sales are financed. See Pet. 15 & n.12. To calculate informally the effect of the panel decision on auto lenders, we will hypothesize that a small percentage of all auto sales (say 0.1 percent) are loan transactions involving TILA violations, a very conservative estimate, according to respondent's counsel, who says that "nearly all" – not a small fraction of – car transactions involve statutory violations. See page 2, *supra*. We also assume that (as calculated above) the average exposure over each transaction increased from $1000 to either $3780 or $7330 (depending on the type of lender), plus any actual damages and attorneys' fees, as a result of the panel's holding that the cap does not apply to transactions under sub-subparagraph (i). On these ultra-conservative assumptions, the industry's increased TILA exposure is between $47.5 and $110 million yearly, on new automobile loans alone. If one percent rather than 0.1 percent of transactions involve violations, the increased exposure is between $475 million and $1.1 *billion*. For the approximately 28 million yearly used-car purchases, the average amount

financed by financing companies (as of August 2003) was $14,632, over 57 months, at an interest rate of 9.77 percent. The average per-loan TILA exposure, before any actual damages and attorneys' fees, is $7430. Again assuming the conservative 0.1 percent violation rate, the increased TILA exposure to the industry for these transactions is $180 million – and $1.8 billion if the violation rate is one percent. These calculations do not take account of other substantial costs of the panel's holding – including increased incentives for plaintiffs and their counsel to search out and sue over technical TILA violations and decreased incentives for lenders to settle. See Pet. 16-17.

The effect on each individual lending institution also is large. In a lending survey taken of members of *amicus* ABA, the average per-institution volume of outstanding, direct and indirect consumer auto loans for the largest lending institutions – those with total assets of $10 billion or more – was $730 million for the year 2000. Outstanding direct and indirect consumer loans for recreational vehicles and boats averaged another $278 million. Total average outstanding credit on just three categories of loans implicated by the Fourth Circuit's new interpretation of TILA comes to approximately $1 billion per large institution – as much as 10 percent of an institution's total assets. For smaller lenders the effect in terms of percentage of assets may be even more substantial.

Of course, the above calculations take into account only auto loans – which comprise (as of 1998) approximately one-third of the total consumer credit outstanding in the United States. See http://www.federalreserve.gov/releases/g19/Current ($1.4 trillion in consumer credit outstanding in 1998); see VADA Brief, *supra*, at 4 & n.9 ($451 billion in auto loans outstanding). But "TILA is applicable to virtually every form of consumer credit transaction," including "home mortgages to small loans to credit card plans[.]" ROHNER & MILLER, *supra*, ¶ 1.01, at 3. Credit-card debt in the United States amounts to an estimated 95 percent of total revolving debt – or, as of August

2003, approximately $690 billion. See http://www.federalreserve.gov/releases/g19/Current; http://www.consumerfed.org/expndcrdit.pdf (visited October 13, 2003) (stating the 95 percent figure). Another such class of credit is the home-equity line of credit, which, as of June 2002, represented $233 billion of consumer debt in the United States. See *Home Equity Debt is Surging*, CONTRA COSTA TIMES, November 18, 2002, reprinted at http://www.bayarea.com/mld/bayarea/business/4546860.htm (visited October 13, 2003). As of June 2002, the average sum borrowed on a home-equity line of credit was close to $60,000, at an average interest rate of seven percent. *Ibid.* The average home-equity line of credit might readily see finance charges far in excess of $500. And, unlike closed-end consumer credit secured by a dwelling, which is subject to the $2000 cap under Section 1640(a)(2)(A)(iii), home-equity lines of credit remain subject to sub-subparagraph (i). The industry will see vastly increased TILA exposure on these loans as well if the Fourth Circuit's decision stands.

B. The complexity of the disclosure requirements under TILA and Regulation Z virtually guarantees that technical violations of their provisions will occur. In fact, it seems that regularly they do. In congressional testimony, a former Chairman of the Federal Deposit Insurance Corporation stated that "the complexity of Regulation Z is such that the FDIC cited more than 2,700 of the 3,500 institutions that we examined in 1994 for at least one violation." *Hearings on S. 650 before the Subcomm. on Financial Institutions and Regulatory Relief of the Senate Comm. on Banking, Housing and Urban Affairs,* 104th Cong., 1st Sess., at 9 (1995) (statement of FDIC Chairman Ricki Helfer) (FDIC Testimony). And Congress has been wary of the challenges the "highly technical" rules pose to lenders:

> Creditors * * * have encountered increasing difficulty in keeping current with a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions. There is also evidence that many creditors have sincerely tried to comply with the Act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation.

S. REP. NO. 96-73, 96th Cong., 1st Sess. (1979), reprinted in 1980 U.S.C.C.A.N. 280, 281.

Despite regulatory and congressional awareness, the technical nature of the TILA requirements remains. Disclosure requirements for closed-end credit (like the automobile loan at issue in this case) are set forth in 15 U.S.C. § 1638; and, for open-end credit such as credit cards and home-equity lines of credit, in 15 U.S.C. §§ 1637 & 1637a. But the greater complexity comes in Regulation Z, which interprets TILA. That regulation occupies nearly 250 pages in the Code of Federal Regulations. See 12 C.F.R. Part 226. Specific regulations on the disclosures govern the relative size of type on disclosures that are required to be written; the specific language that must be used in the disclosures; the type of information that may be provided with the disclosures; whether disclosures must be oral or written; when disclosures must be made; when and whether disclosures must be updated; whether written disclosures must be given to the borrower to keep or merely to view; and in some cases, specific required terminology. See 12 C.F.R. §§ 226.5a, 226.5b, & 226.17.

Regulation Z also imposes requirements governing the content of disclosures, including the identity of the creditor; the amount financed; a separate itemization of the amount financed broken down by type of charge; the total finance charge; in the case of open-end credit, a complex description of how the finance charge is calculated; the annual percentage rate; in the case of a variable rate, facts related to the variation – and the list goes on. See 12 C.F.R. §§ 226.6 & 226.18. Regulation Z may fairly be termed a "cradle-to-grave" regulation – covering pre-transaction conduct such as advertising; imposing disclosure requirements subsequent to the initial transaction; dictating the

appropriate treatment of credit balances; and establishing consumers' rights of rescission. *Id.* Part 226, Subparts B & C.

As courts and commentators have observed, TILA and Regulation Z together create something of a "trap for the unwary creditor." See John W. Edmonds, III & George W. Taylor, Jr., *Truth and Consequences*, 35 WASH. & LEE L. REV. 367, 391 (1978) ("[TILA] was a well-intentioned statute. Unfortunately, it seems to serve mostly as a trap for the unwary creditor, increasing the cost of credit extensions and eliminating the small credit extender from the market as opposed to achieving benefits for the consumers on whose benefit it was enacted."); see also Pet. 18 (discussing authorities). Respondent's counsel observes on his Internet site that "[n]early every car transaction contains one or more violations of a statute or regulation."[4] The hyper-technicality of the regulations makes it *likely* that significant consumer loan transactions will see violations of TILA (see FDIC Testimony, *supra*); and the near-strict-liability civil enforcement scheme imposes financial penalties for each such violation. Pet. 4. One court noted: "A penalty is imposed on the defendant * * * though it has acted in good faith and despite the fact that plaintiff has sustained no damages." *Wilson* v. *Allied Loans, Inc.*, 448 F. Supp. 1020, 1022 (D.S.C. 1978) (describing TILA litigation as a "puzzle" where prizes are awarded "to those who can uncover the technical defects"); see also *McGowan* v. *King*, 569 F.2d 845, 847 (5th Cir. 1978) ("Once again, despite proper and reasonable efforts to comply, an installment sale creditor falls victim to the complex disclosure requirements of the Truth in Lending Act."). Even before the panel's new interpretation of Section 1640(a)(2)(A), consumers' counsel were not blind to the opportunities to bring TILA suits. See Pet. 17 (noting that shortly after the enactment of TILA, in one year two percent of

[4] See page 2, *supra*. Counsel's Internet site also advertises that these "statutes and regulations" can be used "to escape a bad car deal."

the federal civil caseload arose under TILA). Under the panel's new rule, this can only increase.

TILA claims filed in the federal courts numbered from hundreds to as many as 2000 in the two decades after the enactment of the statute. Pet. 17; see ROHNER & MILLER, *supra*, ¶ 12.01, at 785-786 & n.1. Although primary enforcement was intended to be by administrative agencies (1968 U.S.C.C.A.N. at 1976), private enforcement under Section 1640(a) "quickly became the dominant mode, at least as measured by numbers of lawsuits[.]" ROHNER & MILLER, *supra*, ¶ 13.01, at 886.

The predictable effect of the panel's decision – the exposure of TILA defendants to uncapped punitive liability under Section 1640(a)(2)(A)(i) – already has spread beyond this case. A TILA judgment of $1000 that was imposed in October 2002 for a technical violation of the statute was amended last Spring to the uncapped amount of $13,345.82, plus $18,871 in attorneys' fees – in reliance on the panel decision below. See *Rucker* v. *Sheehy Alexandria, Inc.*, No. 02-466-A, (E.D. Va. March 18, 2003) (Order).[5] As in the case before the Court, the *Rucker* plaintiff did not prove actual damages, and the TILA violation was sheer inadvertence on the part of the lender – in that case, failure accurately to disclose the annual percentage rate on a second retail installment sales contract. The potential for results like this case and *Rucker* is virtually limitless. The panel's new rule allows consumers to enter consumer loans and, if they ever become dissatisfied with their purchase, recover tens of thousands of dollars from lenders regardless of harm to

[5] The *Rucker* court held the $18,871 fee award reasonable in part because of the size of the uncapped statutory recovery for the plaintiff. Therefore, as in this case (see Pet. 12 n.9), the substantial attorneys' fees might be less if liability was capped at $1000, as required by Section 1640(a)(2)(A). Also, before the panel decision, a TILA defendant facing a colorable claim was encouraged to settle for the $1000 statutory maximum and therefore incur little to no liability for attorneys' fees, whereas the increased liability under the Fourth Circuit's decision would greatly reduce the incentive to settle.

the borrower or culpability of the lender. Compare *Sanders* v. *Auto Assocs., Inc.*, 450 F. Supp. 900, 902 (D.S.C. 1978) ("Unfortunately, many [TILA] cases * * * have not been brought by plaintiffs who were misled or misinformed by the loan forms they attack. These plaintiffs merely sought a windfall penalty from a lender by picking apart its loan form word by word in search of a technical deviation from the language of the statutes and regulations.").

Victories for TILA plaintiffs under the panel's new rule will be harmful to consumers nationwide because of increases in the cost of credit. Importantly, there is no reason to believe that the massively increased TILA liability that was brought about by the panel's decision will result in improved disclosures by creditors like members of *amici*. Those institutions already are largely successful at meeting their TILA obligations; and those violations that do occur are the result of the hyper-technical nature of the statutory and regulatory requirements (see pages 11-13, *supra*) and will not be cured by imposing greater punishment. And TILA has already had the effect that it was designed to have, with the universal recognition of the $1000 cap on statutory liability. The first decade of enforcement saw thousands of TILA claims filed yearly, but by 1985 that number had dwindled to 245. See ROHNER & MILLER, *supra*, ¶ 12.01, at 785 n.1. So respondent and others like him will the only beneficiaries of the panel's rule, and the cost of their windfalls will be borne by other consumers. And the windfall for plaintiffs, and for their counsel, is won at the risk of catastrophe to the consumer credit industry – and, thereby, to the national economy.

II. A Principled Reading of TILA and its Legislative History Compels the Conclusion That Congress Intended the $1000 Liability Limitation to Encompass Both Sub-subparagraphs (i) and (ii) of Subparagraph (A) of 15 U.S.C. § 1640(a)(2)

A. The panel opinion is an exercise in *reductio ad absurdum*, making a mockery of the time-honored interpretive

techniques. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997) ("Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute."). By blindly following the *punctuation* of two sub-subparagraphs in the statute, and assuming that the "subparagraph" to which the $1000 limitation applies is sub-subparagraph (ii) rather than subparagraph (A), as it always has been (Pet. App. 10a-13a), the panel misconstrued the literal text *and* ignored essential rules guiding the process of interpretation. "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." SCALIA, *supra*, at 23.

No court – not even the panel below – has ever held that Congress intended to amend the cap on damages when it added the third sub-subparagraph to subparagraph (A). Pet. App. 13a ("It could well be, as Judge Gregory concludes, that Congress did not intend to alter the statutory cap applicable under subparagraph [*sic*] (A)(i) when it amended the statute in 1995."). But the panel insisted on looking only to what it took (by misunderstanding the word "subparagraph") to be the facially plain meaning of the statutory text, even when doing so led to a result that Congress plainly did not intend, and a result that could fairly be characterized – were resort to such characterization necessary – as absurd.[6]

This Court, in a unanimous opinion, has expressly disapproved of conducting "plain-meaning analysis" of a statute by looking solely to punctuation, when doing so distorts the statute's true meaning:

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[6] The panel reached this result although the pre-1995 version is susceptible to the same erroneous strict-constructionist reading that the panel applies to the current version – but uniformly was interpreted to impose a cap on liability on both sub-subparagraphs (i) and (ii). See pages 3-4, *supra*.

> A statute's plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation. But a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning. Along with punctuation, text consists of words living "a communal existence," in Judge Learned Hand's phrase, the meaning of each word informing the others and "all in their aggregate tak[ing] their purport from the setting in which they are used."

United States Nat'l Bank of Oregon, 508 U.S. at 454 (quoting *NLRB* v. *Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Hand, J.)). But in its exercise of "interpretation," the court below did just what this Court has disapproved.

Commentary supports treating the confusion caused by the 1995 amendments as not altering the meaning of sub-subparagraphs (i) and (ii). "Congress did not change its mind about the meaning of that word [subparagraph], but instead neglected to make the necessary adjustment when it added a third part to accommodate transactions secured by real estate." Elwin Griffin, *Searching for Truth in Lending: Identifying Some Problems in the Truth in Lending Act and Regulation Z*, 52 BAYLOR L. REV. 265, 305 (2000). After the panel decision, Professor Griffin has reiterated this view: "Congress merely intended to add a third clause to the subparagraph but neglected to amend the language to accommodate the continuing limitation in parts (i) and (ii). This interpretation seems preferable to treating clause (ii) as the only part that would be subject to the $100/$1000 limitation." Elwin Griffin, *The Truth and Nothing But the Truth: Confronting the Challenge in the Truth in Lending Act and Regulation Z*, 40 HOUS. L. REV. 345, 414-415 (2003) (noting the conflict in the circuits between the decision below and *Strange*, 129 F.3d at 947).

Finally, no basis exists to believe that Congress decided to allow the $1000 liability limitation on sub-subparagraph (i) to expire without mentioning such a far-reaching change in the

legislative history and without making any change to the statutory text other than the addition of a third sub-subparagraph. In the amendments giving rise to the panel's mistaken interpretation of the statute, Congress *specifically addressed the $1000 cap* and decided it was not adequate to address the important concerns that arise when lenders seek security in borrowers' homes. Congress therefore added a specific provision (Section 1640(a)(2)(A)(iii)) to increase that cap to $2000 in some circumstances. See *Clay* v. *Johnson*, 77 F. Supp. 2d 879, 885 (N.D. Ill. 1999) (citing *Strange*, 129 F.3d at 947), rev'd on other gnds., 264 F.3d 744 (7th Cir. 2001). But Congress did nothing to the liability cap as it applies to other consumer loans and to leases. By turning a blind eye to all indications of Congress's intent (Pet. App. 13a) – including the statute itself – the panel held that Congress's most startling amendment to TILA was one that Congress never discussed.

B. The panel's reading of Section 1640(a)(2)(A) will inevitably yield untenable results. For example, an innocent, technical violation of TILA in the case of a car *loan* (such as a simple miscalculation of the amount financed) could produce substantial statutory punitive liability under Section 1640(a)(2)(A)(i) – as happened in this case. But even an egregious, intentional violation – or multiple violations (see 15 U.S.C. § 1640(g)) – of TILA in the case of a car *lease* could only produce, at the most, $1000 in statutory damages, under Section 1640(a)(2)(A)(ii). Those results could occur regardless of – and in fact, inversely to – the relative culpability of the lender. Compare *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559, 575 (1996) ("the degree of reprehensibility" of the conduct is the "most important indicium of the reasonableness of a punitive damages award").

The panel's interpretation causes similar results if we compare loan transactions like the one at issue in this case with loans that are secured by home or real-property mortgages. If a commercial lender enters into a loan transaction secured by a dwelling – a transaction covered by Section 1640(a)(2)(A)(iii)

– and the finance charges on the loan transaction run into the tens of thousands of dollars, the lender's TILA liability is $2000 plus attorneys fees, even if the lender deliberately violates requirement after requirement of Regulation Z. But if an automobile dealership lends money for the purchase of an automobile and neglects to include the expense of tax, tags, and titling in the cost of credit disclosure, the lender's liability under TILA is uncapped – and, as in this case, potentially much greater than on the home loan. This result is directly contrary to Congress's clear intent to provide *additional* liability in the case of loans secured with a house or real property.

Finally, in the class action context, the effects of the panel's interpretation become even more far-fetched. Class-action recovery is capped at "$500,000 or 1 per centum of the net worth of the creditor[.]" Section 1640(a)(2)(B). Therefore, under the panel's interpretation of Section 1640(a)(2)(A), if a lender makes an error in its TILA disclosures in one loan transaction, it is subject to uncapped liability of two times the finance charges – possibly, as in the case before the Court, tens of thousands of dollars. On the other hand, if that same lender has a net worth of $2.5 million, and makes the same error with regard to *multiple* different loan transactions with different borrowers, it is subject to liability capped at one percent of its net worth, or $25,000. The liability in the individual action is the same as the total exposure in the class action. Even removing the net-worth limitation from the above example, for large consumer transactions it will be the exceptional circumstance that recovery to a class member can even come close to uncapped individual recovery. No right-minded plaintiff would ever seek to certify a class under TILA if the decision below were correct, but Congress clearly intended the class action provision to have some effect.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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